McGeorge Law Review

Volume 15 | Issue 4 Article 7

1-1-1984

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Encroachment on individual privacy through the use of electronic surveillance devices has been made alarmingly possible by modern technological advancements.[1] Recently, federal agents employing this investigative technique videotaped acceptances of bribes by high ranking state and national government officials, which resulted in the ABSCAM arrests.[2] The defendants' arguments that the videotaping had violated their constitutional rights were rejected and they were found guilty of official corruption.[3] Currently, uncertainty exists concerning the extent to which the use of electronic surveillance is subject to constitutional protections to prevent ensnarement of the innocent.[4] In the absence of restraints, such as the warrant requirement of the fourth amendment to the United States Constitution,[5] the ultimate anxiety is police omniscience of personal affairs.[6]

The essence of the fourth amendment is the protection of privacy from arbitrary intrusion by the state.[7] Freedom from unreasonable searches and seizures is protected by the requirement of a warrant based upon probable cause and a particular description of the place to be searched and the thing to be seized.[8] The purpose of the fourth amendment warrant requirement[9] is to ensure that adequate facts exist, as determined by a neutral judicial officer, to justify an invasion of privacy.[10] The United States Supreme Court has expressed a strong

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1. Courtney, *Electronic Eavesdropping, Wire Tapping and Your Right to Privacy*, 26 FED. COM. B.J. 1, 7 (1973).
2. *ABSCAM: A Fair and Effective Method of Fighting Public Corruption*, in ABSCAM ETHICS 8 (G. Caplan ed. 1983).
3. *Id.* at 3.
4. *Id.* at 4.
5. U.S. CONST. amend. IV.
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.
Id.
6. Lopez v. U.S., 373 U.S. 427, 466 (1963) (Brennan, J., dissenting).
7. Courtney, *supra* note 1, at 6.
8. U.S. CONST. amend. IV.
9. *Id.*
10. Courtney, *supra* note 1, at 6.

preference for the use of warrants.[11] The Court has reasoned that a decision by a detached magistrate protects against hurried decisions made by police while actively engaged in the enterprise of ferreting out crime.[12]

In *United States v. White,*[13] a four-person plurality of the Court held that no warrant is required prior to the use of bugged informants by government agents.[14] In *White,* the defendant had objected under the fourth amendment to use of an agent's testimony concerning incriminating statements the defendant had made to an informer.[15] The informer had worn a transmitter, allowing the agent to overhear his conversation with the defendant.[16] The government had failed to seek a warrant prior to the electronic surveillance.[17]

This comment proposes that a warrant should be required prior to the use of bugged informants in criminal investigations. California should reject *White* under the state constitutional right to privacy,[18] which affords protection against threats to personal privacy[19] from governmental surveillance and data collecting activities.[20] Initially, an examination of the recent adoption of Proposition 8[21] in California will be made to demonstrate that the author's proposal is viable despite the truth-in-evidence section[22] of that state constitutional amendment. An in-depth view will be taken of the early federal cases leading up to *White* which will reveal the flaws in the rationale of that case. A discussion of the current state of the law in California concerning the use of bugged informants will follow. This comment will examine cases in Michigan and Alaska, two states that have rejected *White,* with emphasis on the grounds for rejection. A discussion of current interpretations of the California right to privacy will demonstrate why the provision is an appropriate vehicle for rejecting *White.* This discussion will include commentary on state Penal Code sections[23] aimed at protecting against invasions of privacy, which will reveal the breadth

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11. *See, e.g.,* U.S. v. Ventresca, 380 U.S. 102, 105-06 (1965) (search warrant); Beck v. Ohio, 379 U.S. 89, 96 (1964) (arrest warrant).
12. *Ventresca,* 380 U.S. at 105-06.
13. U.S. v. White, 401 U.S. 745 (1971).
14. *Id.* at 751 (Justice Brennan concurred in the result only).
15. *Id.* at 748-49.
16. *Id.*
17. *Id.*
18. CAL. CONST. art. I, §1.
19. White v. Davis, 13 Cal. 3d 757, 773, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975).
20. *Id.*
21. CAL. CONST. art. I, §28 (Proposition 8 enacted in June 1982).
22. *Id.* §28(d).
23. CAL. PENAL CODE §§630-637.5.

of the proposed protection under the state constitutional right to privacy.

The degree of protection available under the right to privacy will vary depending on the competing individual and societal interests involved.[24] A discussion of the competing interests when electronic surveillance devices are used will reveal that no significant burden will be imposed on law enforcement by requiring a warrant. Finally, this comment will establish the minimum standards of the procedural components of the proposed warrant requirement. The first step toward rejecting *White* under the California right to privacy, however, is an examination of the Proposition 8 truth-in-evidence section.

"Right to Truth-In-Evidence"

Recently, California voters amended the state constitution to include provisions known as the "Victims' Bill of Rights."[25] One of the sections is entitled "Right to Truth-In-Evidence."[26] The section provides that "[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding. . . ."[27] Uncertainty, therefore, exists concerning the extent to which California courts may rely on independent state grounds to impose higher standards under the state constitution than those required in the federal system. An examination of the intent of Proposition 8 and application of rules for construction of constitutional provisions will demonstrate the viability of excluding evidence obtained by the warrantless use of electronic surveillance under the right to privacy.

The fundamental rule for construing initiative measures is to ascertain the intent of the lawmakers to effectuate the purpose of the law.[28] The Legislative Analyst's ballot pamphlet analysis may be helpful in determining the probable meaning of the initiative.[29] The analysis of the truth-in-evidence section of Proposition 8 states that this measure *generally* will allow *most* relevant evidence to be admitted subject to exceptions the Legislature may enact in the future.[30] Prior to Pro-

24. White v. Davis, 13 Cal. 3d at 760-61, 533 P.2d at 224, 120 Cal. Rptr. at 96.
25. Cal. Const. art. I, §28.
26. *Id.* §28(d).
27. *Id.* For the purpose of this discussion, the author assumes that the evidence obtained through the warrantless use of electronic surveillance is relevant to the charges subsequently adjudicated.
28. People v. Harrison, 150 Cal. App. 3d 1142, 1155, 198 Cal. Rptr. 762, 770 (1984).
29. *Id.*
30. Brosnahan v. Brown, 32 Cal. 3d 236, 302, 651 P.2d 274, 316, 186 Cal. Rptr. 30, 72 (1982).

position 8, evidence obtained through unlawful eavesdropping or wiretapping could not be used in court.[31] The Legislative Analyst's use of the words "generally" and "most," however, merely adds to the uncertainty of the scope of the truth-in-evidence provision.

The express purpose of the law is found in section 28, subdivision (a).[32] The text reflects an intent to ensure a bill of rights for victims of crime through creation of a right to restitution and a basic expectation that felons will be appropriately detained, tried, and sufficiently punished by the courts.[33] The section calls for broad reforms in the procedural treatment of *accused* persons and sentencing of *convicted* persons.[34]

These reforms are focused on that period of time *after* a crime has been committed. This author's concern is for the procedures employed during the period of discovery or prevention of crime. For example, once a person has become a police detainee, case law holds a reasonable expectation of privacy no longer exists.[35] At the point of detention, clearly, a compelling public need exists that warrants intrusion on privacy, under the proposed right to privacy protection.[36] From this perspective, the author's proposal is consistent with the express purpose of the law in section 28, subdivision (a).[37]

Arguments in favor of Proposition 8, also contained in the ballot pamphlet, further reflect what the law was intended and expected to achieve.[38] These arguments voice the concern that the state courts have created additional rights for the *criminally accused,* in derogation of the rights of innocent victims of violent crimes.[39] The rebuttal argument is that Proposition 8 needlessly reduces personal liberties, and as an example, states that the law would condone use of wiretapping without a warrant.[40]

The author agrees with this assessment that Proposition 8 goes too far in attempting to provide aid to victims of crimes.[41] Electronic surveillance of conversations in the hopes of discovering or preventing criminal activity risks the freedoms of noncriminals.[42] A person

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31. *Id.*
32. CAL. CONST. art. I, §28(a).
33. *Id.*
34. *Id.*
35. *See infra* notes 281-83 and accompanying text.
36. *See infra* notes 252-66 and accompanying text.
37. CAL. CONST. art. I, §28(a).
38. *Brosnahan*, 32 Cal. 3d at 305, 651 P.2d at 319, 186 Cal. Rptr. at 75.
39. *Id.*
40. *Id.*
41. *Id.*
42. *See infra* notes 315-18 and accompanying text.

need not be a criminal to be a victim of this investigative technique.[43] Only two provisions of Proposition 8 relate directly to victims,[44] therefore, the asserted intent of the law[45] is contradicted by the actual text of the law.[46]

Another basic rule for construing constitutional amendments is that words and phrases are not to be viewed in isolation, but in the context of other provisions bearing on the same subject.[47] The goal is to harmonize all related constitutional provisions without distorting their meaning and to give effect to the scheme as a whole.[48] The California constitutional provisions against unreasonable searches and seizures,[49] the right to privacy,[50] and the truth-in-evidence section of Proposition 8[51] all bear on the admissibility of evidence.[52] The Proposition 8 provision, therefore, must be interpreted in harmony with the two other related constitutional provisions.[53] By thus comparing the truth-in-evidence provision with the right to privacy and the right to be free from unreasonable searches and seizures, the analysis leads to one final rule of construction for constitutional provisions.

A specific provision will govern a general provision, even though the general one, standing alone, is broad enough to include the subject to which the specific provision relates.[54] The specific provision is treated as an exception that qualifies the general provision,[55] especially when they are inconsistent.[56] The specific provision will govern whether passed before or after the general provision.[57] A subsequent

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43. *Id.*
44. *Brosnahan*, 32 Cal. 3d at 271, 651 P.2d at 295, 186 Cal. Rptr. at 51 (Bird, C.J., dissenting).
45. CAL. CONST. art. I, §28(a).
46. *Brosnahan*, 32 Cal. 3d at 271, 651 P.2d at 295, 186 Cal. Rptr. at 51 (Bird, C.J., dissenting).
47. Armstrong v. County of San Mateo, 146 Cal. App. 3d 597, 610-11, 194 Cal. Rptr. 294, 301 (1983).
48. *Id.*, at 611, 194 Cal. Rptr. at 301.
49. CAL. CONST. art. I, §13.
50. *Id.* §1.
51. *Id.* §28(d).
52. *See, e.g.*, Cleaver v. Superior Court, 24 Cal. 3d 297, 307, 594 P.2d 984, 989, 155 Cal. Rptr. 559, 564 (1979) (admissibility under provision against unreasonable searches and seizures); People v. Triggs, 8 Cal. 3d 884, 895, 506 P.2d 232, 239, 106 Cal. Rptr. 408, 415 (1973) (admissibility of evidence under right to privacy); *In re* Lance W., 149 Cal. App. 3d 838, 845-46, 197 Cal. Rptr. 331, 335-36 (1983) (admissibility under the truth-in-evidence section of Proposition 8).
53. State Bd. of Equalization v. Board of Supervisors, 105 Cal. App. 3d 813, 822, 164 Cal. Rptr. 739, 744 (1980).
54. Rose v. State of California, 19 Cal. 2d 713, 724, 123 P.2d 505, 512 (1942).
55. *Id.* at 723-24, 125 P.2d at 512.
56. *Id.*
57. *In re* Williamson, 43 Cal. 2d 651, 654, 276 P.2d 593, 594 (1954).

general provision, however, may repeal a prior specific provision in general words.[58]

The analysis begins with determining whether the truth-in-evidence provision is general or specific. The pertinent language of the section provides that "relevant evidence shall not be excluded in any criminal proceeding."[59] In *Brosnahan v. Brown,*[60] a case challenging Proposition 8 as violating the single subject rule for initiatives, the California Supreme Court upheld the law,[61] but noted the broad sweep of the matters contained within it.[62] The dissent in *Brosnahan* also stressed the breadth of the provisions.[63] Specifically, the dissent questioned the effect of the truth-in-evidence provision on dozens of specific evidence code sections.[64] The dissent concluded that subdivision (d) of section 28, as written, could affect every criminal proceeding.[65] Clearly, the only qualifying language in the truth-in-evidence provision is that the evidence must be relevant.[66] The section, therefore, must be viewed as a general constitutional provision[67] that will be controlled by any related specific provision.[68]

The California right to privacy is included among the various inalienable rights of the people.[69] The right to privacy, therefore, is incapable of being surrendered without the consent of those possessing the right.[70] Although the majority in *Brosnahan* held that Proposition 8 concerned matters having one general object,[71] the opinion is devoid of the dissenters' analysis of the issue of whether the voters were aware of the contents of the initiative.[72] The dissent states that the voters could have had no idea of the scope of the changes section 28, subdivision (d) would implement.[73] Adoption of Proposition 8, including the sweeping truth-in-evidence provision, therefore, cannot be viewed as a surrender of the inalienable right to privacy.[74]

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58. *Id.*
59. CAL. CONST. art. I, §28(d).
60. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
61. CAL. CONST. art. II, §8(d).
62. *Brosnahan*, 32 Cal. 3d at 246, 651 P.2d at 280, 186 Cal. Rptr. at 36.
63. *Id.* at 271, 651 P.2d at 295, 186 Cal. Rptr. at 51.
64. *Id.* at 275, 651 P.2d at 297-98, 186 Cal. Rptr. at 54.
65. *Id.*
66. CAL. CONST. art. I, §28(d).
67. *See supra* notes 54-66 and accompanying text.
68. County of Humboldt v. Workers' Comp. Appeals Bd., 147 Cal. App. 3d 595, 602, 195 Cal. Rptr. 181, 185 (1983).
69. CAL. CONST. art. I, §1.
70. BLACK'S LAW DICTIONARY 683 (5th ed. 1979).
71. *Brosnahan*, 32 Cal. 3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.
72. *Id.* at 278-79, 651 P.2d at 300, 186 Cal. Rptr. at 56.
73. *Id.* at 285, 651 P.2d at 304, 186 Cal. Rptr. at 60.
74. *See supra* notes 69-73 and accompanying text.

The ballot pamphlet for the right to privacy amendment states that the provision is aimed at providing protection against encroachment by surveillance and data collecting activities.[75] The specific purpose is to prevent government and business from collecting, stockpiling, and misusing unnecessary information.[76] These clear statements of the intent behind the right to privacy reveal the specific situations in which it may be invoked.[77] The specific constitutional right to privacy, therefore, will govern over the general truth-in-evidence section of Proposition 8,[78] even though that section was adopted subsequent to the right to privacy amendment.[79]

The foregoing analysis demonstrates that, despite adoption of the truth-in-evidence provision of Proposition 8, California courts still maintain the power to impose a higher standard under the state constitutional right to privacy in electronic surveillance cases than that required by the federal constitution.[80] In the recent superior court decision of *In re Lance W.*,[81] however, the court held that the truth-in-evidence provision completely abolished the use of independent state grounds to exclude relevant evidence.[82] The defendant argued that his rights under the state constitutional provision against unreasonable searches and seizures[83] had been violated, which required exclusion of the evidence obtained against him.[84] The broad issue in *Lance* was the protection California may offer against unreasonable searches and seizures in light of the truth-in-evidence provision.[85] The court found the "clear" intent of the truth-in-evidence provision was to restore the supremacy of federal case law.[86]

The state right to be free from unreasonable searches and seizures is virtually identical to the federal fourth amendment.[87] The narrow issue in *Lance* was whether the rule of vicarious standing was available to the defendant under the state unreasonable search and seizure right, despite the truth-in-evidence provision.[88] Under federal law, fourth amendment rights are personal and may be asserted only by persons

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75. White v. Davis, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.
76. *Id.*
77. *See supra* notes 75-76 and accompanying text.
78. *See supra* notes 54-77 and accompanying text.
79. *Williamson*, 43 Cal. 2d at 654, 276 P.2d at 594.
80. *See infra* notes 234-40 and accompanying text.
81. *Lance*, 149 Cal. App. 3d at 838, 197 Cal. Rptr. at 331.
82. *Id.* at 846, 197 Cal. Rptr. at 335-36.
83. CAL. CONST. art. I, §13.
84. *Lance*, 149 Cal. App. 3d at 844, 197 Cal. Rptr. at 334.
85. *Id.*
86. *Id.* at 847, 197 Cal. Rptr. at 336.
87. *Id.*; U.S. CONST. amend. IV (*see supra* note 5 for text of fourth amendment).
88. *Lance*, 149 Cal. App. 3d at 847-48, 197 Cal. Rptr. at 336-37.

having a legitimate expectation of privacy in the place searched or the property seized.[89] Absent proof of standing, under the federal rule, the challenged evidence cannot be excluded on this basis.[90] In light of what the court believed to be the intent of the truth-in-evidence provision, to return supremacy to federal case law holdings concerning the exclusion of evidence,[91] the court held that the prior state vicarious exclusionary rule was subsumed under the federal fourth amendment decisions.[92]

Lance, however, is distinguishable from the proposal in this comment. The federal constitution contains no express right similar to the state constitutional right to privacy.[93] Federal precedential authority on the right to privacy is unavailable to California courts,[94] unlike the situation in *Lance* where the United States Supreme Court had addressed the vicarious standing question under the fourth amendment.[95] The *Lance* decision itself allowed that, in the absence of controlling federal precedent, state courts are free to interpret the fourth amendment in a manner consistent with the state constitution, including the truth-in-evidence provision.[96]

The same reasoning applies when a conflict arises between the right to privacy and the truth-in-evidence provision. As previously demonstrated, the two constitutional provisions must be read in the context of each other.[97] When placed against each other, the specific right to privacy will govern the general truth-in-evidence provision.[98] The absence of federal authority on an express right to privacy, therefore, allows California courts to construe the right to privacy as an independent state ground for requiring exclusion of evidence obtained through the warrantless use of bugged informants, despite the truth-in-evidence provisions.[99]

The United States Supreme Court has considered privacy expectations in the past, but those cases involve claims of violation of fourth amendment rights, not the right to privacy.[100] Current California law

89. U.S. v. Payner, 44 U.S. 727, 731 (1980).
90. *Id.*
91. *Lance*, 149 Cal. App. 3d at 847, 197 Cal. Rptr. at 336.
92. *Id.* at 848, 197 Cal. Rptr. at 337.
93. *See infra* notes 192-96 and accompanying text.
94. Of course, the United States Supreme Court has considered privacy expectations in the past, but those cases involve claims of violation of rights under the fourth amendment. *See infra* notes 103-63 and accompanying text.
95. *Payner*, 44 U.S. at 731.
96. *Lance*, 149 Cal. App. 3d at 847 n.5, 197 Cal. Rptr. at 336 n.5.
97. *Armstrong*, 146 Cal. App. 3d at 610-11, 194 Cal. Rptr. at 301.
98. *See supra* notes 54-79 and accompanying text.
99. *See supra* notes 81-97 and accompanying text. *Lance* is on review to the California Supreme Court.
100. *See infra* notes 103-63 and accompanying text.

reflects adherence to the federal decisions considering privacy expectations under fourth amendment claims.[101] Nonetheless, the most recent California decision that follows federal precedent in a case of the warrantless use of bugged informants was decided prior to adoption of the state constitutional right to privacy.[102] Before demonstrating how the right to privacy allows California courts to provide greater protections against electronic surveillance, an examination of prior federal holdings is necessary to establish a base from which to begin the analysis.

Early Cases and *United States v. White*

Federal case law holds that a search warrant is not required under the fourth amendment protection against unreasonable searches and seizures when incriminating evidence is obtained from a defendant in conversations with a trusted colleague who is in fact a government agent.[103] Also, a search warrant is not required when the defendant unknowingly gives information to a person who is secretly a government agent.[104] Furthermore, early cases held that no constitutional violation occurred when these same agents recorded[105] or contemporaneously transmitted[106] conversations, unbeknownst to the defendant, without a warrant.

One of these early cases, *On Lee v. United States,*[107] involved the monitoring of a defendant's conversation with an acquaintance who was a bugged informer.[108] The conversation was transmitted to an agent located outside the area.[109] The Court, in adhering to precedent,[110] held that surveillance without any trespass fell outside the ambit of the Constitution.[111] No trespass was committed because consent from the defendant to the informer's entry had been obtained by fraud.[112] Additionally, no trespass occurred when an agent outside the area electronically monitored the conversation inside.[113]

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101. *See infra* notes 164-77 and accompanying text.
102. *See infra* notes 171-72 and accompanying text.
103. Hoffa v. U.S., 385 U.S. 293, 302 (1966).
104. Lewis v. U.S., 385 U.S. 206, 212 (1966).
105. *Lopez*, 373 U.S. at 439.
106. On Lee v. U.S., 343 U.S. 747, 752-53 (1952).
107. *Id.* at 747.
108. *Id.* at 749.
109. *Id.*
110. Goldman v. U.S., 316 U.S. 129, 134-35 (1942); Olmstead v. U.S., 277 U.S. 438, 457, 464 (1928).
111. *On Lee*, 343 U.S. at 753-54.
112. *Id.* at 752.
113. *Id.*

The trespass doctrine relied upon in *On Lee* subsequently was overruled in *Katz v. United States.*[114] *Katz* held that the proper test to determine fourth amendment protections is not whether a defendant is in a "constitutionally protected area,"[115] but whether his privacy, upon which he justifiably relied, had been violated.[116] The trespass doctrine was no longer controlling.[117] Furthermore, *Katz* rejected the argument made by the government that electronic surveillance was exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause.[118]

Katz was the first case to hold that fourth amendment protection cannot turn on the presence or absence of physical intrusion into a given area.[119] In that case, federal agents attached an electronic listening and recording device to the outside of a telephone booth.[120] The agents overheard the defendant's end of conversations when he placed calls from the booth, and his incriminating statements later were used at trial to secure his conviction for violating a federal statute prohibiting the transmission of wagering information by telephone.[121] The defendant's objection to the use of the evidence on the ground that it had been obtained without a search warrant in violation of the fourth amendment was overruled by the trial court.[122]

The federal court of appeals upheld the trial court decision and affirmed the conviction since no physical intrusion into the area had occurred.[123] The Supreme Court rejected this formulation of the issue.[124]

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[125]

The Court held that the agents' actions violated the privacy on which the defendant justifiably relied.[126] Their intrusion into the defendant's

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114. 389 U.S. 347 (1967).
115. *Id.* at 351.
116. *Id.* at 353.
117. *Id.*
118. *Id.* at 358.
119. *Id.* at 353.
120. *Id.* at 348.
121. *Id.*
122. *Id.* at 354, 356, 358.
123. *Id.* at 349.
124. *Id.* at 350.
125. *Id.* at 351-52.
126. *Id.* at 353.

privacy thus constituted a search and seizure under the fourth amendment.[127] Since no warrant was obtained[128] and none of the well-established exceptions to the warrant requirement had been met,[129] the search was unreasonable.[130] Furthermore, the Court found that requiring a warrant under these circumstances does not impinge upon the legitimate needs of law enforcement.[131]

Justice Harlan's concurring opinion sets forth the dual requirement that must be met to garner fourth amendment protection.[132] A person must exhibit a subjective expectation of privacy and the expectation must be objectively recognizable by society as reasonable.[133] Justice Harlan's frequently quoted explanation of the majority opinion in *Katz* has since become the "touchstone of the constitutional right of privacy as against surreptitious governmental eavesdropping."[134] An analysis of *White,* however, will show how the *Katz* principles were limited when evidence was obtained through the warrantless use of a bugged informant.[135]

The facts in *White* were nearly identical to those in *On Lee.*[136] An informer was outfitted with a transmitter to allow government agents to overhear conversations with the defendant without first obtaining a warrant.[137] The plurality in *White* accepted the fact that *On Lee* was overruled by *Katz,*[138] but only to the extent that *Katz* held fourth amendment violations do not depend on whether a trespass had occurred.[139] The discussion in *White* concerning the effect of *Katz* on *On Lee* appears to limit the possible sweep of *Katz* merely to overruling prior cases that required physical intrusion before a fourth amendment violation could be found.[140]

The court of appeals in *White,* however, had interpreted *Katz* as

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127. *Id.*
128. *Id.* at 356.
129. *Id.* at 357, 362 (Harlan, J., concurring); *see, e.g.*, Warden v. Hayden, 387 U.S. 294, 298-300 (1967) (hot pursuit warrantless entry); Cooper v. California, 386 U.S. 58, 61-62 (1967) (search of lawfully impounded automobile); Brinegar v. U.S., 338 U.S. 160, 174-77 (1949) (nonrandom roadblock search); McDonald v. U.S., 335 U.S. 451, 454-56 (1948) (invalid search since not within exception); Carroll v. U.S., 267 U.S. 132, 153, 156 (1925) (search incident to arrest).
130. *Katz,* 389 U.S. at 357.
131. *Id.* at 356.
132. *Id.* at 361 (Harlan, J., concurring).
133. *Id.*
134. Robinson v. Superior Court, 105 Cal. App. 3d 249, 255, 164 Cal. Rptr. 389, 392 (1980).
135. *White,* 401 U.S. at 750.
136. *Id.*
137. *Id.* at 746-47.
138. *Id.* at 750.
139. *Id.*
140. *Id.*

completely overruling *On Lee.*[141] The court of appeals held that fourth amendment violations are not dependent upon trespass notions,[142] and furthermore, evidence obtained by warrantless electronic eavesdropping was inadmissible.[143] The Supreme Court plurality in *White* rejected the second part of that holding.[144]

Justice White, writing for the plurality, refused to find a constitutionally justifiable expectation of privacy in warrantless recording or transmission of conversations.[145] He reasoned that since the law permits intrusion upon expectations of privacy when a trusted colleague verbally reports back to the authorities,[146] no different result should obtain when the same agent records or transmits the conversation.[147] In terms of the risk involved in either situation, the plurality refused to distinguish informers from informers with recorders.[148] The justices reasoned that the argument that a defendant's statements would be substantially different if he suspected that the person with whom he was conversing was wired for sound was only speculation.[149]

Interestingly, the situation in *White* was distinguished from *Katz* since *Katz* did not involve revelations to the government by a party to the conversation.[150] In essence, *Katz* held that obtaining evidence by the warrantless attachment of an electronic device to a telephone booth, where a person expects privacy, is *unreasonable.*[151] Despite this determination, *White* held that the warrantless attachment of a similar device to an informer, to gain incriminating information from a conversation that a person likewise expects is private, *is* reasonable.[152] The dispositive fact for the Court appears to have been the presence or absence of a conniving participant to the conversation.[153]

The dissenters in *White*, unlike the plurality, stated that the court of appeals had correctly interpreted *Katz* as completely overruling *On*

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141. *Id.*
142. *Id.* at 748-49.
143. *Id.* at 747, 750.
144. *Id.* at 750.
145. *Id.* at 752-53.
146. *See Hoffa*, 385 U.S. 302 (trusted colleague really an informer); *Lewis*, 385 U.S. at 212 (undercover agent); *Lopez*, 373 U.S. at 439 (informer's recording).
147. *White*, 401 U.S. at 752.
148. *Id.*
149. *Id.*
150. *Id.* at 749. *Katz* did not involve an informer wired for sound, but rather the listening and recording by federal agents of calls in a telephone booth. *Katz*, 389 U.S. at 348.
151. *Katz*, 389 U.S. at 353.
152. *White*, 401 U.S. at 752.
153. *Id.* at 750; *see Katz*, 389 U.S at 354 nn.14, 15. The agents preserved only the defendant's end of the conversations and on the one occasion that another person's statements were intercepted, the agents "refrained from listening." *Id.*

Lee.[154] Justice Douglas, dissenting in *White,* maintained that the core of the decision in *On Lee* was the early common-law notions of trespass.[155] These notions were specifically rejected in *Katz.*[156] Furthermore, according to Justice Douglas, *Katz* emphasized that with few exceptions "searches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment. . . ."[157] Justices Harlan and Marshall, also dissenting in *White,* similarly concluded that *On Lee* can no longer be regarded as sound law in light of the constitutional principles articulated in *Katz.*[158]

In summary, *Katz* directed fourth amendment search and seizure analysis away from rigid trespass and property notions to the more flexible approach of determining when a reasonable expectation of privacy exists.[159] In overruling *On Lee, Katz* also established that a warrant is required for electronic surveillance[160] which does not impinge upon the needs of law enforcement.[161] *White,* however, rejected by a mere plurality the notion that evidence obtained by warrantless electronic eavesdropping is inadmissible.[162] Most states, including California,[163] have adopted the view of the plurality in *White,* despite *Katz.* An examination of the use of bugged informants in California will reveal that current case law does not reflect a consideration of the state right to privacy.

California: *People v. Murphy*

In *People v. Murphy,* the government intercepted and recorded the defendant's conversation by means of a transmitting device concealed in the clothing of his brother, a police informer.[164] The defendant contended his fourth amendment rights had been violated by the warrantless electronic surveillance, citing *Katz* for the proposition that his reasonable expectations of privacy had been intruded upon.[165] The court rejected this contention and maintained that *Katz* only protects

154. *White,* 401 U.S. at 747; *see also* Dancy v. U.S., 390 F.2d 370, 371 (5th Cir. 1968) (considering *On Lee* viable despite *Katz*).
155. *White,* 401 U.S. at 759, 760-61 (Douglas, J., dissenting).
156. *Katz,* 389 U.S. at 351, 353.
157. *White,* 401 U.S. at 761 (Douglas, J., dissenting) (quoting *Katz,* 389 U.S. at 357).
158. *Id.* at 769 (Harlan, J., dissenting), 796 (Marshall, J., dissenting).
159. *See supra* notes 114-17 and accompanying text.
160. *See supra* note 118 and accompanying text.
161. *See supra* note 131 and accompanying text.
162. *White,* 401 U.S. at 750; *see supra* notes 142-43 and accompanying text.
163. People v. Murphy, 8 Cal. 3d 349, 360, 503 P.2d 594, 601, 105 Cal. Rptr. 138, 145, *cert. denied,* 414 U.S. 833 (1973).
164. *Id.* at 354, 503 P.2d at 597, 105 Cal. Rptr. at 141.
165. *Id.* at 358, 503 P.2d at 600, 105 Cal. Rptr. at 144.

persons from the uninvited ear.[166] The judges could perceive no distinction between informants verbally reporting conversations and informants recording or transmitting conversations.[167] Apparently, the court drew support for this position from the distinction set out in *White* between the attachment of an electronic device to a telephone booth and the attachment of the device to an informer to monitor a conversation.[168] The court held that *Katz* does not protect against a breach of trust by a party to a conversation.[169]

Significantly, *Murphy* was decided in November 1972, the same month during which California voters amended the state constitution to provide explicit protection for every individual's privacy interest.[170] The defendant in *Murphy* did not argue that his right to privacy under the California Constitution had been violated[171] because the case was decided before the amendment was adopted by the voters.[172] The California right to privacy offers protection from government surveillance and data collecting activities.[173] Since *Murphy* was based on the federal case of *White*[174] and preceded this state constitutional protection,[175] a mechanism now exists with which to reject *White.* Two other jurisdictions have rejected *White*[176] based on protections offered under their state constitutions.[177] A discussion of cases concerning bugged informants in Michigan and Alaska follows to show how and why these states have rejected *White.*

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166. *Id.* at 358-59, 503 P.2d at 600-01, 105 Cal. Rptr. at 144-45; *see Katz*, 389 U.S. at 352. Defendant in telephone booth who shuts door and pays toll for call seeks to exclude the uninvited ear. *Katz*, 389 U.S. at 352.

167. *Murphy*, 8 Cal. 3d at 354, 503 P.2d at 601, 105 Cal. Rptr. at 145.

168. *See supra* notes 151-53 and accompanying text.

169. *Murphy*, 8 Cal. 3d at 358-59, 503 P.2d at 600-01, 105 Cal. Rptr. at 144-45.

170. CAL. CONST. art. I, §1 (reworded by constitutional amendment 1974).

171. *See generally Murphy*, 8 Cal. 3d at 358, 503 P.2d at 600, 105 Cal. Rptr. at 144. Defendant contended his fourth amendment rights had been violated. *Id.*

172. Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 402 (1982). The proposed amendment appeared in the California Voter Pamphlet of November 7, 1982, but was not adopted until after the *Murphy* trial court sustained a demurrer. White v. Davis, 13 Cal. 3d 757, 773-75 n.8, 533 P.2d 222, 233-34 n.8, 120 Cal. Rptr. 94, 105 n.8 (1975).

173. White v. Davis, 13 Cal. 3d at 773-74, 533 P.2d at 233, 120 Cal. Rptr. at 105.

174. *See supra* notes 163-69 and accompanying text.

175. *See supra* notes 170-72 and accompanying text.

176. People v. Beavers, 227 N.W.2d 511, 514 (Mich. 1975); State v. Glass, 583 P.2d 872, 876 (Alaska 1978).

177. *Glass*, 583 P.2d at 879, 881; *Beavers*, 227 N.W.2d at 516; ALASKA CONST. art. 1, §§14, 22 (protections against unreasonable searches and seizures and the right to privacy); MICH. CONST. art. I, §11 (right to be free from unreasonable searches and seizures). Both courts also referred to Justice Harlan's expression of the reasonable expectation test in *Katz* as another basis for their decisions. *Glass*, 583 P.2d at 879, 881; *Beavers*, 227 N.W.2d at 516.

MICHIGAN AND ALASKA REJECT *White*

In the Michigan case of *People v. Beavers,*[178] incriminating evidence, obtained by the warrantless use of a police informant equipped with a radio transmitter underneath his shirt, was used to convict the defendant of selling heroin.[179] The defendant argued that *Katz* expanded the right to privacy to include freedom from the uninvited monitoring of a conversation thought to be private, while the State argued that *White* was controlling.[180] The Michigan Supreme Court held that a search warrant should have been obtained before the electronic surveillance was instituted.[181]

Beavers rejected the perception in *White* that participant monitoring is a variant of the privilege of a party to repeat a conversation.[182] Instead, the court adopted Justice Harlan's dissent in *White* that the privilege of a person to control the extent of his communications is paramount.[183] *Beavers* accepted Justice Harlan's distinction between the risk involved in the repetition of conversations and the risk that a conversation is being monitored simultaneously.[184] The court adopted his analysis that the critical question is whether to impose the risks of electronic surveillance on society without at least the protection of a warrant.[185] After balancing the individual and governmental interests against each other, *Beavers* concluded that "more than self-restraint by law enforcement officials is required and at the least warrants should be necessary."[186] Furthermore, referring to the language in *Katz,*[187] *Beavers* reasoned that a party speaking in private has not "knowingly exposed this conversation to the public" merely because an unknown party is secretly hearing every word.[188]

The holding in *Beavers* was based on the protection offered by the Michigan Constitution against unreasonable searches and seizures.[189]

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178. 227 N.W.2d 511.
179. *Id.* at 512.
180. *Id.* at 513.
181. *Id.* at 514.
182. *Id.*
183. *See generally White,* 401 U.S. at 792-93 (Harlan, J., dissenting) (emphasizing that the burden is on the government to justify this intrusion, which by its very nature is broad in scope).
184. *Beavers,* 227 N.W.2d at 515; *see White,* 401 U.S. at 777, 787 (Harlan, J., dissenting). Electronic monitoring may smother the spontaneity of speech since words would be measured a good deal more carefully and communication inhibited. *White,* 401 U.S. at 777, 787 (Harlan, J., dissenting).
185. *Beavers,* 227 N.W.2d at 515; *White,* 401 U.S. at 786 (Harlan, J., dissenting).
186. *Beavers,* 227 N.W.2d at 515-16; *White,* 401 U.S. at 786-87 (Harlan, J., dissenting).
187. *See supra* note 125 and accompanying text.
188. *Beavers,* 227 N.W.2d at 515 (quoting *Katz,* 389 U.S. at 351).
189. *Id.* at 516. The decision was based on article I, §11 of the Michigan Constitution,

Michigan, like other jurisdictions, has a tradition of interpreting the state constitution as affording more protections than those required by the United State Supreme Court in interpretations of the federal constitution.[190] Michigan, therefore, interpreted the state right to freedom from unreasonable searches and seizures more broadly than the interpretation of the analogous fourth amendment provision in *White.*[191]

The United States Constitution does not contain an express right to privacy.[192] Various Bill of Rights provisions have been held applicable to the states via the due process clause of the fourteenth amendment, including the fourth amendment protection against unreasonable searches and seizures.[193] Some of the specific guarantees of the Bill of Rights have penumbra that create zones of privacy[194] in matters of marriage, childbearing, religion, housing, or education.[195] The protection of a *general* right to privacy, however, is left largely to the law of the individual states.[196] Alaska, which has a state constitutional right to privacy, rejected *White* on this basis.[197] An examination of the treatment of bugged informants under the Alaska right to privacy follows.

In the Alaska case of *State v. Glass,* a police informer was outfitted with a transmitting device that allowed government agents to overhear a conversation between the informer and the defendant.[198] The evidence secretly obtained without a warrant later was used to try to convict the defendant of selling heroin.[199] At trial, the defendant argued that the use of his incriminating statements violated his right to be free from unreasonable searches and seizures under both the United States and Alaska Constitutions,[200] and his right to privacy under the Alaska Constitution.[201] The Alaska Supreme Court affirmed

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which is virtually identical to the fourth amendment protection of the United States Constitution. *Id.*

190. Note, *Third-Party Participant Monitoring Constitutes a Search and Seizure Which Can Be Justified Only If a Valid Search Warrant Is Issued,* 45 U. CIN. L. REV. 133, 137 n.31 (1976).
191. *Beavers,* 227 N.W.2d at 516.
192. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
193. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
194. *Griswold,* 381 U.S. at 484.
195. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
196. *Katz,* 389 U.S. at 350-51.
197. *Glass,* 583 P.2d at 879 (quoting *Katz,* 389 U.S. at 350-51); ALASKA CONST. art. I, §22.
198. *Glass,* 583 P.2d at 874.
199. *Id.*
200. U.S. CONST. amend. IV; ALASKA CONST. art. I, §14.
201. ALASKA CONST. art. I, §22.

the grant of the defendant's motion to suppress the evidence by the superior court on the basis of the state right to privacy.[202]

While the prosecutor relied upon federal decisions dealing with the fourth amendment,[203] the court expressly stated that it was not bound by them.[204] Although careful consideration must be given to the decisions of the United States Supreme Court,[205] the protection of a *general* right to privacy is left largely to the law of the individual states.[206] The court found that the federal case authority was questionable and unpersuasive as to construction of the analogous provision in the Alaska Constitution against unreasonable searches and seizures.[207] Furthermore, federal authority was not determinative of the scope of the state right to privacy since that right is not contained in the United States Constitution.[208]

Glass distinguished the risk that a participant secretly is recording or transmitting a conversation from the risk that conversations thought to be confidential will be repeated.[209] The *Glass* court concluded that a substantial difference exists between the risk of betrayal by oral recollection and the risk that remarks are being secretly recorded or broadcast.[210] Mere repetition of confidences to third parties requires a consideration by them of the speaker's credibility and memory.[211] By contrast, preservation of ill-considered and thoughtless remarks on tape eliminates the buffer of considerations of credibility and memory that exist with reported conversation, especially since the remarks may be the product of clever prodding.[212] The sole available alternative to speakers is silence.[213] *Glass* found that this rationale

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202. *Glass*, 583 P.2d at 882.
203. *Id.* at 874.
204. *Id.* at 876. The court cited numerous examples of cases construing the Alaska Constitution as affording additional rights to those offered under the United States Constitution. *Id.* at 876 n.12.
205. *Id.* at 876.
206. *Id.* at 879 (quoting *Katz*, 389 U.S. at 350-51).
207. *Id.* at 874-75.
208. *Id.* at 875.
209. *Id.; see also White*, 401 U.S. at 777 (Harlan, J., dissenting). "[I]t is . . . quite a different matter to foist upon him the risk that an unknown party may be simultaneously listening in." *White*, 401 U.S. at 777 (Harlan, J., dissenting).
210. *Glass*, 583 P.2d at 877; *see White*, 401 U.S. at 786 (Harlan, J., dissenting). We must examine the "desirability of saddling" this risk on society "without at least the protection of a warrant." *White*, 401 U.S. at 786 (Harlan, J., dissenting).
211. *Glass*, 583 P.2d at 878.
212. *Id.* at 877-78; *see White*, 401 U.S. at 787-88 (Harlan, J., dissenting). Having to contend with a documented record of a conversation may well smother that spontaneity of discourse that "liberates daily life." *White*, 401 U.S. at 787-88 (Harlan, J., dissenting).
213. *Glass*, 583 P.2d at 877-78; *White*, 401 U.S. at 787-88 (Harlan, J., dissenting).

from the dissents in *White* led to the conclusion that a warrant was required to prevent the smothering of spontaneous discourse.[214]

Glass relied upon an even more compelling reason, however, for rejecting *White*.[215] The court based the decision on the state constitutional right to privacy,[216] and held that the defendant's privacy right was violated when the police used an informer outfitted with a transmitting device to obtain evidence without first procuring a warrant.[217] The court reasoned that the provision offered broader protection than penumbral rights sometimes inferred from other constitutional provisions.[218]

As previously mentioned, a penumbral right to privacy emanates from certain specific Bill of Rights provisions.[219] When a state has taken the step of creating a specific constitutional right to privacy, the right must be viewed as offering greater protection than the federal penumbral zones of privacy.[220] Otherwise, no reason would exist to amend the state constitution to include a right to privacy.[221]

The *Glass* court was faced with an absence of recorded legislative history of the state right to privacy.[222] The court, however, found analogous provisions recently enacted in other states helpful in construing the scope of the Alaska right to privacy.[223] For example, Hawaii had amended the state constitution to provide against invasions of privacy.[224] In *State v. Roy*,[225] the Hawaii Supreme Court determined that the purpose of the amendment was to protect against extensive governmental use of electronic surveillance devices.[226] *Glass* concluded that the Alaska privacy amendment similarly prohibited electronic monitoring of conversations upon the mere consent of a participant.[227] In defining privacy, *Glass* adopted Justice Harlan's two-pronged *Katz* test of reasonable expectations of privacy[228] and held that the state

214. *Glass*, 583 P.3d at 878; *see also White*, 401 U.S. at 762-63 (Douglas, J., dissenting) (spontaneous speech not free when electronic surveillance is involved), 876-87 (Harlan, J., dissenting) (concern for preserving spontaneity of speech).
215. *Glass*, 583 P.2d at 878.
216. *Id.*
217. *Id.*
218. *Id.* at 879.
219. *Griswold*, 381 U.S. at 484.
220. *Glass*, 583 P.2d at 879.
221. *Id.*
222. *Id.* at 878-79.
223. *Id.* at 879.
224. HAWAII CONST. art. I, §6 (amended 1978).
225. 510 P.2d 1066 (Hawaii 1973).
226. *Id.* at 1068-69.
227. *Glass*, 583 P.2d at 879. Significantly, the court also relied on the interpretation in White v. Davis, 13 Cal. 3d at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105 of the California right to privacy. *Id.*
228. *Id.* at 875.

right to privacy protected individuals from surveillance and data collecting activities.[229]

In summary, Michigan and Alaska have rejected *White* under protections offered under their state constitutions.[230] Both states have held that a warrant is required before law enforcement officials can use bugged informants.[231] The Alaska Constitution contains a right to privacy that is similar to the California right to privacy.[232] Furthermore, Alaska has demonstrated that the state right to privacy is an appropriate vehicle for imposing a warrant requirement for electronic surveillance.[233] An analysis of the California right to privacy will demonstrate that the same approach is available to California for rejecting *White* and requiring a warrant for the use of bugged informants.

California Right to Privacy

The proposal of a warrant requirement under the California right to privacy prior to the commencement of electronic surveillance will include the following steps. First, the author will examine the ability of California courts to recognize greater protections for citizens than those offered under the federal constitution. This discussion will include a reiteration of the above conclusion that the author's proposal and the truth-in-evidence section of Proposition 8 may co-exist. Second, the purpose of the California constitutional amendment will be explored through analysis of case law interpreting the right to privacy. Third, a comparison will be made of two different approaches for determining whether the right to privacy has been violated. Finally, the relationship between the state Penal Code sections aimed at preventing invasions of privacy and the constitutional right to privacy will reveal the breadth of the proposed protection under the state constitution.

Initially, consideration must be given to the state power to impose higher standards than those required by the federal constitution.[234]

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229. *Id.* at 879.

230. *See supra* note 177 and accompanying text.

231. *Beavers*, 227 N.W.2d at 516; *Glass*, 583 P.2d at 877-78. *See generally White*, 401 U.S. at 768-95 (Harlan, J., dissenting) (stressing necessity of warrant for electronic surveillance of conversations).

232. Alaska Const. art. I, §22; Cal. Const. art. I, §1.

233. *See supra* notes 183-88, 215-29 and accompanying text.

234. People v. Pettingill, 21 Cal. 3d 231, 247, 578 P.2d 108, 118, 145 Cal. Rptr. 861, 871 (1978); People v. Disbrow, 16 Cal. 3d 101, 115, 545 P.2d 272, 281, 127 Cal. Rptr. 360, 369 (1976); People v. Brisendine, 13 Cal. 3d 528, 548, 531 P.2d 1099, 1111-12, 119 Cal. Rptr. 315, 328 (1975); 6 Witkin, California Procedure, *Appeal*, 674 (2d ed. 1971).

California state courts are the ultimate arbiters of state law unless their interpretations purport to restrict liberties guaranteed under the federal constitution.[235] As previously demonstrated, the Proposition 8 truth-in-evidence provision seeks to restore supremacy to federal decisions concerning exclusion of evidence.[236] The absence of an express federal right to privacy,[237] however, allows California courts to interpret the state right to privacy in a manner consistent with other state constitutional provisions bearing on the same subject.[238]

United States Supreme Court decisions, however, still are entitled to careful consideration and should be followed unless persuasive reasons exist to follow a different course.[239] The state constitutional right to privacy is a persuasive reason to reject *White* and impose a warrant requirement in a manner consistent with the intent of Proposition 8 to provide aid to victims of violent crime.[240] The purpose of the right to privacy amendment and interpretations in case law, as set out below, will demonstrate that the provision was intended to encompass the proposed protection.

The California Constitution was amended in November 1972 to include the right to privacy among the various inalienable rights of all people.[241] *White v. Davis*[242] was the first major California case to interpret the state constitutional right to privacy. In that case, police officers, posing as students, enrolled in a university and covertly recorded class discussions.[243] The officers compiled police dossiers and filed "intelligence" reports although these reports did not pertain to illegal activities.[244] A professor filed a complaint alleging a violation of the state constitutional right to privacy.[245] The court held that the plaintiffs had alleged a prima facie violation of the right to privacy.[246] Although *White v. Davis* did not deal with the specific problem of

235. *Brisendine*, 13 Cal. 3d at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328.
236. *Lance*, 149 Cal. App. 3d at 847, 197 Cal. Rptr. at 336.
237. *Id.* at 847 n.5, 197 Cal. Rptr. at 336 n.5.
238. *See supra* notes 49-55 and accompanying text.
239. People v. Teresinski, 30 Cal. 3d 822, 836, 640 P.2d 753, 761, 180 Cal. Rptr. 617, 625 (1982). The court stated it lacked reasons to justify rejecting under state law a unanimous, uncriticized decision of the U.S. Supreme Court. *Id.*
240. CAL. CONST. art. I, §28(a).
241. *Id.*, §1. As amended in November 1974, the provision now reads: "All persons are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*
242. White v. Davis, 13 Cal. 3d at 757, 533 P.2d at 222, 120 Cal. Rptr. at 94.
243. *Id.* at 760, 533 P.2d at 224, 120 Cal. Rptr. at 96.
244. *Id.*
245. *Id.* at 761-62, 533 P.2d at 225, 120 Cal. Rptr. at 97.
246. *Id.* at 760, 533 P.2d at 224, 120 Cal. Rptr. at 96.

bugged informants,[247] the case is significant to the proposal of this comment because it established that surveillance and data collecting activities fall within the aegis of the right to privacy.[248]

The right to privacy provision was motivated by concern for accelerating encroachment on personal freedom, security, and privacy by increased surveillance and data collecting activities of government and business.[249] The primary purpose of the provision is to afford individuals some measure of protection against the threat to personal privacy.[250] This purpose is set out clearly in a statement drafted by the proponents of the provision and included in the state ballot pamphlet.[251] "This amendment creates a legal and enforceable right of privacy for every Californian. . . . The right of privacy is . . . a fundamental and compelling interest. . . . This right should be abridged only when there is a compelling public need. . . ."[252]

The language in the ballot pamphlet indicates that the burden is on the government to justify an intrusion into privacy by a compelling need.[253] Some state courts, however, by relying on the *Katz* principles, have placed the burden on a defendant to show that a reasonable expectation of privacy existed at the time the conversation was recorded.[254] An analysis of these two approaches will reveal that the burden should be on the government to prove that a compelling need justifies the intrusion by electronic surveillance in the absence of a warrant.

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247. *Id.*
248. *Id.* at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105.
249. *Id.* at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.
250. *Id.*
251. *Id.* California decisions have recognized the propriety of resorting to ballot pamphlet arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people. *See, e.g.,* Carter v. Commission, 14 Cal. 2d 179, 185, 93 P.2d 140, 144 (1939).
252. White v. Davis, 13 Cal. 3d at 774-75, 533 P.2d at 233-34, 120 Cal. Rptr. at 105-06.
> The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. . . . At present there are no effective restrains on the information gathering activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian. . . . The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business from collecting and stockpiling unnecessary information about us and from misusing information. . . . Fundamental to our privacy is the ability to control circulation of personal information. . . . Often we do not know that these records even exist. . . . Even more dangerous is the loss of control over the accuracy of government and business records of individuals. . . . This right should be abridged only when there is a compelling public need. . . .

Id.
253. *Id.*
254. *See infra* notes 257-62 and accompanying text.

The compelling need approach is demonstrated by *White v. Davis* in which the court focused on the nature of the government activity, rather than on the individual whose right was violated.[255] The court emphasized that an intrusion into personal privacy must be justified by a compelling interest.[256] Commentators therefore have argued that reasonable expectation analysis has no place in decisions concerning the right to privacy[257] since that shifts the burden of proof from the government to the defendant.[258]

The California Supreme Court, however, drawing from Justice Harlan's two-pronged *Katz* test, added reasonable expectation analysis to subsequent cases alleging a violation of the right to privacy.[259] The courts in these cases have maintained that the constitutional right of privacy was designed to protect confidential communications.[260] The proper test is whether the person whose conversation was recorded had a reasonable expectation of privacy at the time of the recording.[261] This was the approach in the Alaska case of *Glass*, in which the court adopted Justice Harlan's *Katz* test.[262] Although some California courts have taken the approach that puts the burden on the defendant to show that a reasonable expectation of privacy existed at the time of the recording,[263] the better standard, in light of the ballot pamphlet language[264] and *White v. Davis*,[265] would appear to be whether the government can prove a compelling public need justified the instrusion.[266]

The interpretation of the California right to privacy, therefore, differs from the Alaska approach in this respect. Another consideration, however, is the Invasion of Privacy Act contained in the Califor-

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255. Gerstein, *supra* note 172, at 404.
256. White v. Davis, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
257. *See generally* Gerstein, *supra* note 172, at 411-13. It is not the expectation, but the "character of the need for privacy" that justifies the protection. *Id.*
258. *Id.* at 413.
259. *Id.* at 408.
260. North v. Superior Court, 8 Cal. 3d 301, 309, 502 P.2d 1305, 1309, 104 Cal. Rptr. 833, 837 (1972); People v. Newton, 42 Cal. App. 3d 292, 296, 116 Cal. Rptr. 690, 693, *cert. denied*, 420 U.S. 937 (1975). One under arrest, in police custody in a patrol car, has no reasonable expectation of privacy that the conversation will not be recorded. *Newton*, 42 Cal. App. 3d at 296, 116 Cal. Rptr. at 693, *cert. denied*, 420 U.S. 937.
261. *See supra* note 260 and accompanying text.
262. *Glass*, 583 P.2d at 875.
263. *See supra* notes 260-61 and accompanying text.
264. *See supra* note 252 and accompanying text.
265. Gerstein, *supra* note 172, at 404.
266. *See supra* notes 252-56 and accompanying text.

nia Penal Code.[267] A discussion of this statutory scheme, directed at eavesdropping by means of electronic devices, will demonstrate that the proposed protection under the constitutional right to privacy is broader than the protection offered under the statutes.

Section 632 of the Penal Code provides that every person who eavesdrops on or records a confidential communication without the consent of *all* parties shall be subject to punishment by fine, imprisonment, or both.[268] Furthermore, evidence obtained as a result of unlawful recording or eavesdropping upon a confidential communication shall be inadmissible in any judicial, administrative, legislative, or other proceeding.[269] A literal reading of section 632 indicates that *any* governmental use of electronic surveillance is impossible since a defendant, a party to a conversation, would never consent.[270] This would obviate the need for the proposal in this comment, however, the history of the act and case law show the proposed protection is not offered by the sections.[271]

Section 632 was derived from former section 653j.[272] Under that section, the use of devices for eavesdropping upon or recording confidential communications was forbidden in certain situations.[273] The purpose of the former section 653j, however, was to supplement the wiretapping statute embodied in section 631 of the Penal Code.[274] Section 631 prohibits an unauthorized connection to a telephone wire to obtain the contents of a conversation while it is passing over a telephone line.[275] Former section 653j was enacted to cover the situation of recording a telephone conversation after it had reached the intended recipient.[276]

Recent cases do not indicate that the Penal Code sections cover the use of bugged informants.[277] In fact, the courts have relied on

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267. CAL. PENAL CODE §§630-637.5.
268. *Id.* §632a.
269. *Id.* §632d.
270. *Id.* §632a.
271. *See infra* notes 272-86 and accompanying text.
272. CAL. PENAL CODE §653j (former section enacted in 1963).
273. *Id.*
274. *Id* §631 (derived from former section 640).
275. *Id.*
276. People v. Fontaine, 237 Cal. App. 2d 320, 332, 46 Cal. Rptr. 855, 864, *vacated* 386 U.S. 263, *adopted in part on remand*, 252 Cal. App. 2d 173, 60 Cal. Rptr. 325 (1967), *rehearing denied*, 391 U.S. 292 (1968); *cf.* People v. La Peluso, 239 Cal. App. 2d 715, 723-24, 49 Cal. Rptr. 85, 90 (1966). The statute is inapplicable with the consent of a party. *La Peluso*, 239 Cal. App. 2d at 723-24, 49 Cal. Rptr. at 90.
277. *See supra* notes 272-76 and accompanying text.

the reasoning of earlier cases[278] that the statutes are not violated when one party to the conversation consents to electronic monitoring.[279] Other cases involve special factual circumstances that prevent analysis on the precise question of what protections are available against governmental use of electronic surveillance under the statutes.[280] For example, the detainee cases measure the protection in terms of reasonable expectations of privacy.[281] California case law consistently holds that a person who is a detainee at the time a conversation is recorded has no reasonable expectation of privacy.[282] The question of whether a violation of the statute has occurred, therefore, is not directly addressed.[283]

The language of section 632 indicates that a remedy to intrusions into privacy through the use of bugged informants already may exist.[284] The history of this act and case law treatment, however, indicates that the Penal Code sections do not provide adequate protection against the use of bugged informants.[285] The protection, therefore, must be sought under the constitutional right to privacy.[286]

In summary, California is able to grant greater protections under the state constitution than those offered under the federal constitution despite adoption of the truth-in-evidence section of Proposition 8.[287] The purpose of the right to privacy amendment is to protect against invasions of privacy through the use of electronic surveillance in the absence of a compelling public need.[288] Existing Penal Code sections aimed at guarding against invasions of privacy are not broad enough to apply to the warrantless use of bugged informants.[289] Because of these three factors, California should reject *White* under the state constitutional right to privacy and impose a warrant requirement on the use of bugged informants. One remaining concern,

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278. *La Peluso*, 239 Cal. App. 2d at 723-24, 49 Cal. Rptr. at 90; *Fontaine*, 237 Cal. App. 2d at 332, 46 Cal. Rptr. at 864; People v. Albert, 182 Cal. App. 2d 729, 739, 6 Cal. Rptr. 473, 478 (1960); People v. Wojahn, 169 Cal. App. 2d 135, 142-43, 337 P.2d 192, 196 (1959); *cf. Glass*, 583 P.2d at 878. Under the state right to privacy, mere consent of one party to the conversation does not prevent a finding that the right was violated. *Id.*

279. People v. Montgomery, 61 Cal. App. 3d 718, 732, 132 Cal. Rptr. 558, 567 (1976); *Fontaine*, 237 Cal. App. 2d at 332, 46 Cal. Rptr. at 864.

280. *See infra* notes 281-83 and accompanying text.

281. *North*, 8 Cal. 3d at 308-09, 502 P.2d at 1309, 104 Cal. Rptr. at 837.

282. *Id.*

283. *Id.*

284. *See supra* notes 268-70 and accompanying text.

285. *See supra* notes 268-86 and accompanying text.

286. *See supra* notes 272-76 and accompanying text.

287. *See supra* notes 25-102, 234-40 and accompanying text.

288. *See supra* notes 251-53 and accompanying text.

289. *See supra* notes 268-86 and accompanying text.

however, is the effect of the proposed warrant requirement on law enforcement. A discussion of the individual and governmental or societal interests involved will reveal that a warrant requirement imposes no significant burden on law enforcement.

Analysis of Interests

In *Glass*, the Alaska Supreme Court perceived that the meaning of privacy will vary depending on the factual context and the competing individual and societal interests.[290] The nature of the particular police practice and the extent of the impact on individual interests must be balanced against the utility of the conduct as a law enforcement technique.[291] The assessment of the individual and governmental interests which follows demonstrates that a warrant is necessary for electronic monitoring because of encroachments on privacy made possible by modern technology.[292]

Participant monitoring is a vitally important investigative tool of law enforcement.[293] Equally significant, however, is the security enjoyed by persons who know that the risk of intrusion by means of electronic surveillance devices is subject to constitutional protections against unreasonable searches and seizures.[294] Courts have the duty to maintain the precious balance between individual freedom and privacy, and the law enforcement needs of the state.[295]

As a practical matter, evidence of certain crimes, due to their clandestine nature, may be obtained only through the use of informers or electronic surveillance devices.[296] This is relevant to the propriety of imposing an additional burden on law enforcement officers to take the time necessary to procure a warrant.[297] Nevertheless, failure to seek a warrant prior to commencing electronic surveillance is inexcusable.[298] As in other search and seizure contexts, an exigent cir-

290. *Glass*, 583 P.2d at 879-880; *see White*, 401 U.S. at 772 (Harlan, J., dissenting). "[T]he courts should proceed with specially measured steps" in striking a constitutional balance between the public and private interests at stake. *White*, 401 U.S. at 772 (Harlan, J., dissenting).

291. *White*, 401 U.S. at 786 (Harlan, J., dissenting).

292. Courtney, *supra* note 1, at 7.

293. *Glass*, 583 P.2d at 880; *Beavers*, 227 N.W.2d at 515.

294. *Beavers*, 227 N.W.2d at 515.

295. Comment, *The Fourth Amendment, Electronic Eavesdropping and The Invasion of Privacy*, 17 S.D.L. Rev. 238, 250 (1972).

296. *Glass*. 583 P.2d at 880; *see White*, 401 U.S. at 770 n.3 (Harlan, J., dissenting) (quoting A. Westin, Privacy and Freedom 131 (1967) (discussing "political" crimes, extortion, conspiracy, narcotics and similar crimes)).

297. *White*, 401 U.S. at 760 (Douglas, J., dissenting), 770 n.3 (Harlan, J., dissenting) (quoting A. Westin, Privacy and Freedom 131 (1967)); *Glass*, 583 P.2d at 880.

298. *White*, 401 U.S. at 760 (Douglas, J., dissenting).

cumstances exception to the warrant requirement will ease the burden on law enforcement officers operating in situations of extreme urgency.[299] The argument that a warrant requirement will result in inefficient law enforcement, therefore, is unjustified.[300]

Opponents also maintain that use of an electronic recording of incriminating evidence produces a more reliable version of what a defendant has said than the unaided memory.[301] In *Glass*, the Alaska Supreme Court addressed this issue.[302] Evidence is not excluded at trial because of the extent to which it is unreliable.[303] Evidence is excluded, however, when the values preserved by constitutional guarantees are of greater societal concern than the use of that evidence to obtain a conviction.[304] As in other criminal procedure contexts, protection of constitutional rights is of higher priority than achieving convictions based on evidence obtained in violation of those rights.[305]

Assurances of self-restraint by law enforcement officials are inadequate to protect the values preserved by constitutional guarantees[306] because of the possibility of arbitrariness.[307] Investigatory action that impinges on privacy must be subjected to the warrant requirement to be constitutionally permissible.[308] The emphasis must be on establishing in advance the circumstances that justify the intrusion and submitting them for review to an independent assessor.[309]

The individual right to privacy has been defined as the right "to be let alone"[310] or the right to determine the extent to which information about oneself is communicated to others.[311] Electronic surveillance is the greatest leveler of human privacy ever known.[312]

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299. *White*, 401 U.S. at 781-84 (Harlan, J., dissenting). Among the exceptions to the warrant requirement are the stop and frisk cases and the administrative search cases. *White*, 401 U.S. at 781-84 (Harlan, J., dissenting); *Glass*, 583 P.2d at 881; *Beavers*, 227 N.W.2d at 516 n.10. Exigent circumstances also have been found when evidence might be lost if a warrantless search were not conducted immediately, the search is made incident to a lawful arrest, or conducted while in hot pursuit. *Beavers*, 227 N.W.2d at 516 n.10.

300. *Glass*, 583 P.2d at 880; *Beavers*, 227 N.W.2d at 515.

301. *White*, 401 U.S. at 753; *Glass*, 583 P.2d at 886 (Burke, J., dissenting); *see also Lopez*, 373 U.S. at 439. The argument amounts to saying a defendant is entitled to rely on flaws in agents' memories. *Lopez*, 373 U.S. at 439.

302. *Glass*, 583 P.2d at 878.

303. *Id.*

304. *Id.*

305. *Id.*

306. *White*, 401 U.S. at 762 (Douglas, J., dissenting).

307. *Id.* at 782 (Harlan, J., dissenting).

308. *Id.* at 781 (Harlan, J., dissenting).

309. Note, *supra* note 190, at 138.

310. *Glass*, 583 P.2d at 880.

311. *Id.* at 880.

312. *White*, 401 U.S. at 756 (Douglas, J., dissenting).

The resulting corrosive impact from surveillance on our sense of security and freedom of expression[313] poses a grave danger of chilling private, free, and unconstrained communication.[314]

The trouble with electronic surveillance is that it is indiscriminate, subjecting all conversation, both innocent and criminal, to official scrutiny.[315] A person need not be a criminal to be a victim.[316] While a warrant requirement may benefit some of the guilty, caution should be exercised before individual rights are surrendered to the state.[317] Furthermore, the purpose of the warrant requirement is not to end electronic surveillance, but to prevent officials from engaging in the practice without first testing their version of the facts before a neutral magistrate who will determine whether probable cause exists.[318]

Even conceding that indiscrete electronic surveillance would greatly aid in the apprehension of criminals, the costs in terms of loss of privacy far exceed the benefits,[319] and thus require law enforcement officers first to obtain a warrant.[320] Courts have determined that a judicial order authorizing the carefully limited use of electronic surveillance can accommodate the legitimate needs of law enforcement officers.[321] The warrant requirement will not end electronic surveillance,[322] but a neutral determination of probable cause by a magistrate will protect individual interests from a frail exercise of self-restraint by law enforcement officers.[323]

Having established that California should reject *White* under the state constitutional right to privacy[324] and that a balancing of the competing interests involved reveals no significant burden on law enforcement,[325] one final consideration remains. The procedural components of the warrant requirement must be examined separately. Certain minimum standards must be met before and after authorization of electronic surveillance is granted.

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313. *Glass*, 583 P.2d at 877.
314. *Id.* (quoting *Lopez*, 373 U.S. at 452 (Brennan, J., dissenting)).
315. *White*, 401 U.S. at 759-60 (Douglas, J., dissenting) (quoting *Lopez*, 373 U.S. at 465-66 (Brennan, J., dissenting)); Courtney, *supra* note 1, at 5.
316. *White*, 401 U.S. at 757 (Douglas, J., dissenting); People v. Triggs, 8 Cal. 3d 884, 893, 506 P.2d 232, 237-38, 106 Cal. Rptr. 408, 414 (1973).
317. Comment, *supra* note 295, at 248.
318. *White*, 401 U.S. at 788-89 (Harlan, J., dissenting); Comment, *supra* note 295, at 249.
319. Comment, *supra* note 295, at 249.
320. *Id.*
321. *Katz*, 389 U.S. at 356; Comment, *supra* note 295, at 248.
322. Comment, *supra* note 295, at 249.
323. *White*, 401 U.S. at 782 (Harlan, J., dissenting); *Beavers*, 227 N.W.2d at 515; Comment, *supra* note 295, at 249.
324. *See supra* notes 234-89 and accompanying text.
325. *See supra* notes 290-323 and accompanying text.

WARRANT REQUIREMENT

The fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[326] Although the proposed warrant requirement seeks to protect individual privacy, the government still must be allowed to pursue legitimate law enforcement goals.[327] California can establish the procedural requirements for a warrant by considering those developed by Alaska in cases following *Glass*,[328] and the concept of minimization in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[329]

As previously mentioned, Alaska has rejected *White* under the state right to privacy.[330] A warrant requirement was imposed under the state constitution for electronic monitoring of private conversations.[331] The Alaska courts, therefore, have given considerable treatment to the procedural components of the requirement.[332] This persuasive treatment should be used by California in setting the warrant requirement under the right to privacy.[333]

Alaska courts have determined that the affidavit presented to a neutral magistrate must contain facts sufficient to establish probable cause to believe criminal activity will be discovered through monitoring or recording a conversation.[334] This requirement is not significantly different from the probable cause requirement of an ordinary search warrant.[335] One difference, however, is that a particularized description, not only of the person or thing to be seized, but also of the place to be searched, is required for an ordinary search warrant.[336]

The surveillance warrant, however, must give a description, with reasonable specificity, of the time the conversation is expected to take place, the person or persons involved, and the subject matter of the

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326. U.S. CONST. amend. IV.
327. Note, *"Minimizing" Interception of Innocent Communications*, 53 TUL. L. REV. 264, 265 (1978) (referring to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520).
328. *See infra* notes 330-50 and accompanying text.
329. 18 U.S.C. §§2510-2520.
330. ALASKA CONST. art. I, §22; CAL. CONST. art. I, §1.
331. *Glass*, 583 P.2d at 881.
332. *Id.* at 881; *see also id.* at 881 n.36 (leaving further refinement of warrant requirement to future cases).
333. *See infra* notes 334-50 and accompanying text.
334. *Glass*, 583 P.2d at 881; Jones v. State, 646 P.2d 243, 246 (Alaska Ct. App. 1982).
335. *Brinegar*, 338 U.S. at 175-76.
336. U.S. CONST. amend. IV; *see infra* notes 346-48 and accompanying text.

conversation.[337] The time requirement is important since the information relied upon to establish probable cause may grow stale.[338] The description of the person necessarily refers to the nonconsenting party, that is, the party from whom the incriminating conversation is sought.[339] Finally, the affidavit must set forth the incriminating matter expected to be the subject of the conversation.[340]

The type of warrant involved is not one to authorize entry into premises or a search of a person or place, but rather a warrant to seize the conversation.[341] In one Alaska case, the defendant challenged the sufficiency of the affidavit for failure to describe with particularity the place where the conversation was to occur.[342] In that case, the court held that inclusion of a description of the place was not mandated.[343] The court reasoned that the requirement does not substantially increase the protection of a person's privacy.[344] The key to preventing a general search in this area is requiring a reasonably specific description of the time, subject matter, and person from whom the conversation is sought to be seized.[345]

The requirements for execution of an ordinary warrant do not fit the circumstances of recording or transmitting conversations.[346] Usually, officers must serve notice of lawful intrusion upon rights to defendants.[347] While a similar need exists to give defendants notice that their privacy rights are going to be intruded upon by electronic surveillance, compelling reasons exist to postpone advance notice.[348] Obviously, a strict requirement that the warrant be served on the defendant at the time the conversation is to be monitored would render the technique ineffective.[349] The rules pertaining to execution of the warrant, therefore, must be relaxed.[350]

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337. *Glass*, 583 P.2d at 881; *Jones*, 646 P.2d at 247-48.
338. U.S. v. Steeves, 525 F.2d 33, 37 (8th Cir. 1975).
339. *Jones*, 646 P.2d at 249.
340. *Id.* at 248; *see* Berger v. New York, 388 U.S. 41, 58 (1967) (requiring subject matter description); *cf. Katz*, 389 U.S. at 365-66 (Black, J., dissenting). He expressed doubt as to the ability to describe a conversation that is to take place in the future. *Katz*, 389 U.S. at 365-66 (Black, J., dissenting).
341. *Jones*, 646 P.2d at 247.
342. *Id.* at 248; *cf.* 18 U.S.C. 2518 (requiring a particular description of the place).
343. *Jones*, 646 P.2d at 248.
344. *Id.*
345. *Id.*
346. *Id.* at 249.
347. *Katz*, 389 U.S. at 355 n.16; *Jones*, 646 P.2d at 249.
348. *Jones*, 646 P.2d at 249.
349. *Katz*, 389 U.S. at 355 n.16; *Jones*, 646 P.2d at 249.
350. *Jones*, 646 P.2d at 249.

The Alaska cases discussed above cover the physical requirements of the warrant which, when presented to a neutral magistrate, allow authorization of the use of electronic surveillance.[351] One remaining consideration is how to limit what conversations may be electronically monitored under the warrant. Often, while engaged in the electronic surveillance of conversations under a previously obtained warrant, law enforcement officers overhear conversations, with or without criminal implications, on matters not set forth in the warrant. California should consider the treatment of this issue in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which applies to federal law enforcement agents electronically monitoring telephone calls.[352]

Title III was enacted by Congress to authorize limited electronic surveillance by the government.[353] The purpose of the Act is to protect individual privacy while still allowing law enforcement officers to pursue legitimate law enforcement goals.[354] The act expresses the concept of minimization in the use of electronic monitoring of conversations.[355] The monitoring should involve no greater invasion of privacy than is necessary under the circumstances.[356] *Katz* laid the groundwork for this concept by noting that although the agents in that case failed to procure a warrant, they did refrain from intercepting conversations unrelated to their investigation.[357] Other cases have established that the proper test is the reasonableness standard of the fourth amendment,[358] which means that not all interceptions of conversations not set forth in the warrant necessarily violate minimization.[359] The agent's duty to minimize interception of innocent conversations must be measured by whether a reasonable agent would have perceived that the conversation was nonpertinent to the investigation.[360]

The following is a summary of the procedural components of the proposed warrant requirement under the California right to privacy.

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351. *See supra* notes 330-50 and accompanying text.
352. 18 U.S.C. §2518.
353. Note, *supra* note 327, at 265.
354. *Id.*
355. 18 U.S.C. §2518.
356. *Berger*, 388 U.S. at 56; *see also* Note, *supra* note 327, at 266 (electronic monitoring limited to conversations related to the crime under investigation).
357. *Katz*, 389 U.S. at 354 n.15.
358. U.S. v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd. sub nom*, U.S. v. Giordano, 469 F.2d 522 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 505 (1974).
359. U.S. v. Falcone, 364 F. Supp. 877, 886 (D. N.J. 1973), *aff'd. mem.*, 500 F.2d 1401 (3d Cir. 1974).
360. Note, *supra* note 327, at 265.

The affidavit must contain facts sufficient to establish probable cause to monitor conversations electronically.[361] The affidavit must describe with particularity the time and subject matter of the conversation, and the party from whom the conversation is sought to be seized.[362] A duly qualified magistrate could then constitutionally authorize this limited search and seizure of a conversation.[363] Finally, the officers must exercise caution to protect against a greater invasion of privacy than is necessary under the circumstances.[364]

Conclusion

The author proposes that California courts should adopt a warrant requirement under the state constitutional right to privacy prior to the use of electronic surveillance, specifically the use of bugged informants. As demonstrated, the truth-in-evidence section of Proposition 8 does not bar California courts from excluding evidence obtained through the warrantless use of electronic surveillance when the evidence is challenged under the specific state right to privacy guarantee. An examination of federal cases reveals no impediment to California providing greater protections to persons against the use of electronic surveillance.

In *Katz v. United States*, the Supreme Court overruled the trespass doctrine and directed search and seizure analysis to a determination of whether a reasonable expectation of privacy existed. Once the subjective and objective components of this expectation are established, a warrant must have been obtained prior to intrusion by law enforcement officers. The case of *United States v. White*, however, limited *Katz* to overruling the trespass doctrine. Despite strong dissents maintaining that electronic surveillance is not a variation of the privilege to repeat conversations, the *White* plurality held that no reasonable expectation of privacy exists that conversations would not be electronically monitored. A warrant, therefore, was not required.

In California, *People v. Murphy* followed the reasoning of the *White* plurality. Significantly, *Murphy* was decided prior to the adoption of a right to privacy amendment to the state constitution. Two other jurisdictions have rejected *White* through protections offered by their state constitutions. Michigan found independent state grounds under the search and seizure provision of the state constitution, which is

361. *See supra* note 334 and accompanying text.
362. *See supra* notes 337-45 and accompanying text.
363. *Katz*, 389 U.S. at 354.
364. *See supra* notes 352-59 and accompanying text.

analogous to the federal fourth amendment, to provide greater protection. Alaska used the same approach, but rejected *White* under the state constitutional right to privacy, which is similar to the California right to privacy. Both states held that a warrant was required prior to the use of bugged informants. California also should require a warrant for the use of bugged informants under the state right to privacy.

The California Constitution was amended in November 1972 to create an inalienable right to privacy. The provision is intended to provide protection to individuals against governmental surveillance activities. Under this right, the burden is on the government to establish a compelling public need to intrude on privacy in the absence of a warrant. Protection of privacy must be sought under the constitutional right to privacy because, although the California Penal Code contains provisions against invasions of privacy, case law holds that the statutes are not violated when one party to the conversation has consented to electronic monitoring. Alaska has determined under the state right to privacy that consent by one party is immaterial. The protection offered under the similar California right to privacy, therefore, is broader than the application of the Penal Code sections. The warrant required prior to the use of electronic surveillance is an insignificant burden on law enforcement in light of the benefits to privacy interests.

Electronic surveillance is a valuable investigative tool. In the absence of exigent circumstances, however, failure to seek a warrant is inexcusable. This simple procedure guards against indiscriminate use of electronic surveillance that subjects innocent and criminal conversations alike to intrusion. The protection of constitutional rights is the highest priority of criminal procedure. The magnitude of constitutional rights far exceeds the conflicting law enforcement goal of attaining convictions. The California constitutional right to privacy, therefore, demands satisfaction of minimal procedural requirements in seeking and obtaining a warrant prior to the use of bugged informants.

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